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No. 97-215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden,

Petitioner,

vs.

THOMAS THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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54 pp

QUESTIONS PRESENTED

1. Does the Ninth Circuit have jurisdiction to recall its mandate in a capital habeas case which is already final, when that action results in the relitigation of the same claims on the same facts in contravention of 28 U. S. C. § 2244(b)(1)?

2. Did the Ninth Circuit abuse its discretion in recalling the mandate in a habeas corpus case which was already final, when the effect of the recall was to reconsider a mixed question of law and fact already decided by the panel, creating no split authority, and not involving any questions of exceptional importance beyond those of the typical capital case?

3. Did the Ninth Circuit, sitting en banc, err in concluding that the three-judge panel "committed fundamental errors of law that would result in a manifest injustice" sufficient to justify recalling its mandate?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petitioner. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's evasion of the successive petition limits established by Congress is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

September, 1997

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

SUMMARY OF FACTS AND CASE

The facts of this case are set forth in Governor Wilson's decision denying clemency, which is reproduced in the appendix to this brief.[1] See *post*, A-3 to A-6. Thompson was convicted of the rape and murder of Ginger Fleischli and sentenced to death, a judgment affirmed by the California Supreme Court. *People* v. *Thompson*, 45 Cal. 3d 86, 753 P. 2d 37 (1988), cert. denied, 488 U. S. 960 (1988). The state high court also denied collateral relief in unpublished orders. See *Thompson* v. *Calderon*, 109 F. 3d 1358, 1363, n. 2 (CA9 1996).

On federal habeas, the District Court denied relief on the murder conviction but granted relief on the rape conviction. *Id.*, at 1362. The rape was the sole "special circumstance" making

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Thompson eligible for the death penalty, *ibid.*, so that the district court's grant of relief on this ground also vacated the death sentence. Both parties appealed, and a three-judge panel reversed the partial grant of relief, reinstating the judgment. *Id.*, at 1374.

The panel opinion was filed June 19, 1996, and amended *nine months* later, on March 6, 1997. The amendment order states, "The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc." J. A. 137. This Court denied certiorari on June 2, 1997. *Thompson* v. *Calderon*, 138 L. Ed. 2d 188, 117 S. Ct. 2426 (June 2, 1997). The Court of Appeals' mandate issued on June 11, 1997. J. A. 1.

According to the majority opinion below, the failure to take a vote on rehearing en banc was the result of "[a] series of misunderstandings." J. A. 215. The error, however, was known prior to the issuance of the mandate. The only explanation for permitting the judgment to become final, and thus requiring extraordinary action to reconsider it, is a vague reference to "comity." J. A. 216.

Thompson requested executive clemency. Governor Wilson "carefully reviewed the materials submitted on his behalf . . . ." See *post*, A-2. He granted an extraordinary two hour personal hearing, at which attorneys for both sides presented their cases. On July 31, he issued a detailed decision explaining why Thompson's new evidence is unconvincing and why it is just that the execution go forward. *Post*, A-15 to A-17.

The California Supreme Court denied a successive habeas petition on July 16. As to Thompson's claims of newly discovered evidence and asserted failure to disclose exculpatory evidence, the denial was on the merits. See J. A. 191. The District Court denied a motion for relief from judgment on July 25. J. A. 189. The District Court notes that the statements of co-defendant Leitch, on which Thompson relies, "are not credible or trustworthy." J. A. 182 (underline omitted).

The three-judge panel of the Ninth Circuit denied a motion to recall the mandate on July 28. J. A. 190-191. The court voted to take the matter en banc on July 30. On August 3, the en banc court recalled the mandate and decided the merits, affirming the District Court's original grant of relief. J. A. 211, 239. This Court granted certiorari the next day.

SUMMARY OF ARGUMENT

The question of whether the Ninth Circuit abused its discretion in recalling the mandate in order to grant rehearing en banc necessarily includes the question of when rehearing en banc should be granted. The majority opinion in this case implies that such rehearing is an error-correcting mechanism employed as part of the ordinary course of capital case review. That is erroneous. Rehearing en banc is for the purpose of obtaining uniformity of decisions, except in rare cases of "exceptional importance." Use of this procedure as a matter of routine injects an additional layer of delay in capital cases with little or no improvement of the reliability of the result.

Use of a general power, such as recall of the mandate, to evade the balancing of interests that went into the crafting of a specific rule, such as the successive petition rule, is an abuse of discretion. Under the principles of *Lonchar* v. *Thomas*, the mandate should not be recalled to reconsider a previously rejected contention of law without new facts; Congress decided that such reconsideration is inappropriate when it enacted 28 U. S. C. § 2244(b)(1).

ARGUMENT

Question 1 in this case asks whether the Court of Appeals had jurisdiction to recall its mandate. Petition for Writ of Mandamus i. *Amicus* CJLF will not brief this point, as we understand it will be thoroughly covered in other briefs. See Supreme Court Rule 37.1. Assuming *arguendo* that the Court

of Appeals did have jurisdiction, Question 2 is whether the exercise of that jurisdiction was an abuse of discretion. As the majority below acknowledged, its action is reviewable on that standard. *Thompson* v. *Calderon*, No. 95-99014, 1997 WL 441835, *1, J. A. 213 (CA9 1997) (en banc)[2] (citing *Hawaii Housing Authority* v. *Midkiff*, 463 U. S. 1323, 1324 (1983) (Rehnquist, J., in chambers)). That question is the principal subject of this brief.

Recall of the mandate to reconsider a question en banc necessarily involves consideration of the purpose and function of rehearing en banc. Thus, despite this Court's denial of certiorari on Question 3, Petition for Writ of Mandamus i, abuse of discretion to recall the mandate cannot be separated from the reasons for hearing the case en banc, and a discussion of those reasons is fairly included in Question 2.

On August 26, this Court directed briefing on a third question: "Did the Ninth Circuit, sitting en banc, err in concluding that the three-judge panel 'committed fundamental errors of law that would result in a manifest injustice' sufficient to justify recalling its mandate?" This brief will address one aspect of that question in part IV.

I. Rehearing en banc is not an element of a party's right of review; it is a device for maintaining uniformity of decisions.

There are many disturbing aspects of the decision below. The one with the most widespread implications, however, is the implication that rehearing en banc, or at least a vote of the full court on whether to take that step, is ordinary procedure rather than extraordinary procedure. "Our *normal* procedure when we, as a court, believe a three-judge panel has *erred*, is to call for a vote on whether to rehear the case en banc." *Thompson*, No. 95-99014, 1997 WL 441835, *2, J. A. 214 (emphasis

2. All citations to this opinion are to the third amended opinion, August 20, 1997.

added). Conspicuous by its absence from this statement is any reference to or evident appreciation of the standards for such rehearing established in the Federal Rules of Appellate Procedure.

A. Purpose and Cost of Rehearing En Banc.

Litigation of any kind is long and drawn out. Federal habeas for state prisoners is doubly so, since the entire proceeding deals with fully completed litigation. Before the federal habeas proceeding properly begins, the defendant has already had as much process as any other litigant is due, if not more. He has already had his day in court. He has already had his timely claims heard. He has already had a decision on them. Then he gets another decision at the federal district court and yet another by a panel of the court of appeals.

Further review does not necessarily improve confidence in the result. Reversal may be a correction of an injustice or it may be the creation of one.

> "Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the judgment).

Describing this Court's discretionary certiorari jurisdiction, Chief Justice Taft noted, "No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants . . . . It is to preserve uniformity of decision among the intermediate courts of appeal." Hearings on

the Jurisdiction of Circuit Court of Appeals and United States Supreme Court before the House Committee on the Judiciary, 67th Cong., 2d Sess., Ser. No. 33, p. 2 (1922). Time and time again, this Court must remind litigants that simple disagreement with the decision below is insufficient for certiorari, and that is why denial connotes no opinion on the merits. See, *e.g.*, *United States* v. *Carver*, 260 U. S. 482, 490 (1923); *Missouri* v. *Jenkins*, 515 U. S. 70, 85 (1995).

Rehearing en banc injects a fourth layer of review. Its function is practically identical to certiorari. Compare Fed. Rule App. Proc. 35(a) with Supreme Court Rule 10. From the text of the rule, it is apparent that the type of issue least appropriate for review en banc is the "fact bound" variety, where the panel applies an established rule of law to the facts of the particular case. Indeed, the First Circuit has a local rule expressly stating that such cases are inappropriate for en banc review. 1st Circuit Loc. Rule 35.1; cf. Supreme Court Rule 10, last sentence.

Where there is no conflict to be resolved, the additional delay of rehearing en banc becomes extremely difficult to justify. The opinion of the en banc court is not significantly more likely to be correct than that of the panel. Sometimes it is shockingly wrong. In *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1044 (CA9 1988) (en banc), for example, the Ninth Circuit held that Arizona's system of capital sentencing by the judge alone was unconstitutional, even though that argument had "been soundly rejected by prior decisions of this Court." *Walton* v. *Arizona*, 497 U. S. 639, 647 (1990) (quoting *Clemons* v. *Mississippi*, 494 U. S. 738, 745 (1990)).[3] See also *Compassion in Dying* v. *Washington*, 79 F. 3d 790 (CA9 1996) (en banc), unanimously reversed in *Washington* v. *Glucksberg*, 521 U. S. ___, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997). While this Court is "infallible because it is final," see *ante*, at 5, the Court

3. The lone dissent on this point was based on the assertion that those prior decisions were incorrectly decided. *Walton*, 494 U. S., at 713-714 (Stevens, J., dissenting).

of Appeals en banc is neither. An additional layer of review which neither appreciably improves the quality of justice in the individual case nor establishes clearer, better, or more uniform rules for the decision of future cases represents a great cost for little benefit.

B. Limitations on Proper Use.

Federal Rule of Appellate Procedure 35(a) recognizes that rehearing "in banc"[4] "is not favored." Such rehearing will ordinarily only be ordered "to secure or maintain uniformity of [the circuit's] decisions" or for questions of "exceptional importance."

The Court of Appeals' complete failure to discuss the standard makes analysis of its opinion difficult. However, since the first reason is clearly inapplicable, one must infer that this is considered "a question of exceptional importance." That implication is reinforced by this passage: "The review we now provide Thompson is available to *every* habeas petitioner on his first petition upon majority vote of this court. It is a part of the full and fair procedure our court affords in connection with initial habeas petitions." *Thompson* v. *Calderon*, No. 95-99014, 1997 WL 441835, *3, J. A. 216 (emphasis added).

Congress passed the habeas reforms in the Antiterrorism and Effective Death Penalty Act in order to expedite the processing of capital cases. The notion that this additional fourth layer of review is available as a matter of routine is contrary to that policy. It is the responsibility of this Court to supervise the use of the en banc rehearing power so that it "achieve[s] its fundamental purpose . . . ." *Western Pacific Ry. Corp.* v. *Western Pacific Ry. Co.*, 345 U. S. 247, 260 (1953). That power is not achieving its purpose if it is routinely invoked

4. See 16A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3981, pp. 561-562, n. 4 (2d ed. 1996) for discussion of the statute's and rule's odd, discordant spelling.

in an unexceptional case which does not create a split of authority.

The execution of an innocent person would, of course, be a grave matter, see *Herrera* v. *Collins*, 506 U. S. 390, 419 (1993) (O'Connor, J,. concurring), but there is no substantial question of guilt here. Thomas Thompson murdered Ginger Fleischli. He was convicted of that crime by a jury which found it proven beyond a reasonable doubt. His newly discovered evidence has been considered by the person best able to do so, the original trial judge, who has concluded it changes nothing. See *post*, A-7 to A-8, A-16. The Governor of California granted him an extraordinary personal hearing and rejected his contentions emphatically. *Id.*, at A-16 to A-17.

Defendant claims he is "innocent of the death penalty" in the sense of *Sawyer* v. *Whitley*, 505 U. S. 333, 347 (1992), *i.e.*, that the sole eligibility circumstance is actually false. This claim has also been considered and rejected on the facts by people far better equipped to do so than the Court of Appeals or, for that matter, this Court. Even more importantly, the premise of *Sawyer* has been rejected by Congress. Having considered the precise question presented in *Sawyer*, Congress decided that only innocence of the *underlying offense* is sufficiently grave to disturb the finality of the denial of the first habeas petition. See 28 U. S. C. § 2244(b)(2)(B)(ii). While this statute has now been construed to apply only to petitions filed after its enactment, *Lindh* v. *Murphy*, 521 U. S. ___, 138 L. Ed. 2d 481, 494, 117 S. Ct. 2059, 2068 (1997), the decision of Congress regarding which circumstances outweigh the need for finality and which do not is still entitled to respect.

C. No Procedural Right.

The status of rehearing en banc as a uniformity-achieving mechanism and not an error-correcting mechanism is further illustrated by the procedural differences between a *petition* for rehearing by the panel and a *suggestion* for rehearing en banc. Compare Fed. Rules App. Proc., Rule 40(a) with Rule 35(b).

Indeed, this difference in purpose is the only rational basis for the difference in procedure.

A petition for rehearing is based on "points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended . . . ." *Id.*, Rule 40(a). In other words, error *simpliciter*. The petition automatically stays the mandate until it is disposed of, *id.*, Rule 41(a), which implies an obligation of the court to rule on it. A suggestion for rehearing en banc, in contrast, does not stay the mandate, *id.*, Rule 35(c), and it does not require any action by the court. Advisory Committee's Notes on Fed. Rule App. Proc. 35 (citing *Western Pacific Ry. Corp.* v. *Western Pacific Ry. Co.*, 345 U. S. 247, 262 (1953)). This Court's rule on the time allowed for a petition for certiorari reflects the same dichotomy. Supreme Court Rule 13.3.

Extraordinary action, even in derogation of a final judgment, is sometimes necessary to restore a review to which a litigant was entitled and of which he was wrongly deprived. For example, when ineffective assistance of counsel causes a defendant to forfeit his direct appeal, a proper remedy is to reinstate an otherwise time-barred appeal. *Evitts* v. *Lucey*, 469 U. S. 387, 399, n. 10 (1985). This rationale does not extend to further reviews, however. See, *e.g.*, *Coleman* v. *Thompson*, 501 U. S. 722, 756-757 (1991) (appeal from denial of collateral review). In this case, we deal with a form of review for which the party has no right to even petition, much less receive, and which would not be properly granted under the standard of the applicable rule. Whatever deviations from "normal" Ninth Circuit procedure may have occurred in this case, they did not deprive Thompson of anything to which he was entitled or of anything which was more likely to achieve the correct result.

II. Recall of the mandate in a completed case is a drastic measure and should be guided by strict limits, following other provisions on reopening cases.

Recall of the mandate of an appellate court can arise in two different contexts, implicating different concerns.

> "If proceedings have continued in the trial court under the mandate, free exercise of the power to recall might interfere with the rules that govern appeals from the continuing proceedings. Free exercise of the power to recall would interfere with the *more profound* interests in repose if proceedings had apparently been terminated by the appellate decision." 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3938, p. 712 (2d ed. 1996) (emphasis added) (cited below as "Wright & Miller").

This case is one of the second, more profound, kind. As the District Court noted in the order denying the Rule 60(b) motion, "judgment on petitioner's first federal habeas proceeding in this Court was final when the case was returned to this court and the mandate was spread." J. A. 171.

The First Circuit has expressed doubt whether the power to recall the mandate exists in this situation. *Boston and Maine Corp.* v. *Town of Hampton*, 7 F. 3d 281, 282-283 (1993) (*per curiam*). Other authorities have stated that the power does exist, see 16 Wright & Miller § 3938, at 714-715, and n. 11, but that it "must be used sparingly." *Id.*, at 716, and n. 14. Invocation of the power after final disposition of the litigation "involve[s] a threat to the fundamental values of repose." *Id.*, at 717.[5] "The very core of res judicata, indeed, is captured in the rules that prevent reopening a judgment once appeal opportunities have been exhausted or abandoned . . . ." *Id.*, at 723.

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5. We can put to one side those cases that recall a mandate to correct clerical errors or otherwise ensure that the judgment documents reflect the court's actual decision. Such clerical matters do not threaten the finality of the court's actual decision.

The power to recall was once limited by the end-of-term rules, but this rigid rule[6] was abrogated by statute in 1948. See *id.*, at 714; 28 U. S. C. § 452. As a result, if the power still exists, Congress has left it without statutory limits. As in other areas involving finality and repose, it is up to the judiciary, and particularly this Court, to establish some limits.

In other areas of law, when Congress has left a judicial power without discernable time boundaries, but where there is no apparent intent to create a limitless power, the usual judicial response is to adopt the limit from an analogous rule. For example, "[i]t is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action, a court 'borrows' or 'absorbs' the local time limitation most analogous to the case at hand." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 355 (1991). There may be controversy over which limitation to borrow, cf. *id.*, at 368 (Stevens, J., dissenting), but limitless causes of action are rare and found only when Congressional intent to that effect is affirmatively shown. *Id.*, at 356, n. 3 (majority). Exposure without limit "would be utterly repugnant to the genius of our laws." *Adams* v. *Woods*, 2 Cranch 336, 342 (1805) (Marshall, C.J.).

One judicially developed rule of limitation was adopted into another in *McCleskey* v. *Zant*, 499 U. S. 467 (1991). The "cause and actual prejudice" standard had been developed in case law for claims defaulted at trial. See *United States* v. *Frady*, 456 U. S. 152, 167-168 (1982). The statutory standard for a second habeas petition asserting new claims was that "the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." *McCleskey*, 499 U. S., at 486 (quoting 28 U. S. C. § 2244, former subd. (b)). The statute did not define "abuse of the writ."

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6. It makes little sense that a court would have an entire year to recall a mandate issued on the first day of a term, but only a few hours to recall one issued on the last day.

The *McCleskey* Court compared the procedural default and abuse of the writ doctrines and found they "implicate nearly identical concerns . . . ." *Id.*, at 490. Among other interests, "both doctrines seek to vindicate the State's interest in the finality of its criminal judgments." *Id.*, at 493. Based on these considerations, the Court adopted the "cause and prejudice" standard for abuse of the writ as well as procedural default.

Congress has since decided that the *McCleskey* standard is not stringent *enough*. It has amended 28 U. S. C. § 2244(b), to read, in part, as follows:

> "(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> "(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> "(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> "(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> "(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense."

In *Felker* v. *Turpin*, 518 U. S. ___, 135 L. Ed. 2d 827, 116 S. Ct. 2333 (1996), the question arose whether the new statutory standard of paragraphs (b)(1) and (b)(2) was mandatory in original habeas petitions filed in this Court. *Felker* did not definitively resolve this question, but applied the new standard anyway. "Whether or not we are bound by these restrictions,

they certainly inform our consideration of original habeas petitions." *Id.*, at 839, 116 S. Ct., at 2339. Because Felker had not met these requirements, as well as the preexisting rule on original habeas petition, his petition was denied. *Id.*, at 841, 116 S. Ct., at 2341.

If paragraphs (b)(1) and (b)(2) do not apply to original habeas petitions in this Court,[7] such petitions might have provided a route for evading the value judgment of Congress regarding what circumstances justify a second round of federal review. By holding, in effect, that these standards would be applied whether they were binding or not, *Felker* plugged the potential loophole.

These cases point the way to resolution of the present case. While Congress has removed an artificial and illogical limit on recall of the mandate, that action should not be construed as preventing judicially crafted limits on an otherwise amorphous and dangerous power. As Justice Frankfurter noted in *Brown* v. *Allen*, 344 U. S. 443, 501-502 (1953) (concurring opinion),

> "it is important, in order to preclude individualized enforcement of the Constitution in different parts of the Nation, to lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State courts." Accord *McCleskey*, 499 U. S., at 496.

The same is true for guidance of the courts of appeals in the present situation. The finality of an apparently final decision on the first round of habeas corpus should not mean one thing in California and something else entirely in Texas.

Two standards for reopening the first habeas petition suggest themselves. The first is the standard enacted by

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7. For the reasons stated in our brief in *Felker*, *amicus* CJLF believes they do. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Felker* v. *Turpin*, No. 95-8836, pp. 14-16.

Congress for "second and successive" petitions.[8] Congress has already balanced the need for finality against the need to correct injustices not corrected on the first round and set the standard.

A second possibility is the general rule for relief from judgment in civil cases, Rule 60 of the Federal Rules of Civil Procedure. In an ordinary civil case, the standards of Rule 60 would be a strong candidate for adoption as the standards for recall of the mandate. In *Standard Oil Co.* v. *United States*, 429 U. S. 17 (1976) (*per curiam*), this Court denied a motion to recall the mandate, because a Rule 60 motion in the District Court was available and, in the circumstances of that case, preferable. *Id.*, at 19. There was no need for the appellate court to recall the mandate and remand for fact-finding, a cumbersome procedure involving two courts instead of one. *Ibid.* If administrative convenience determines which procedure will be employed, it stands to reason that the standard for determining whether to grant relief from judgment would be the same in both procedures.

Habeas corpus, however, is not an ordinary civil case. The civil rules only apply "when appropriate." 28 U. S. C. §2254 Rule 11; see also 28 U. S. C. § 2255 Rule 12; *Frady*, 456 U. S., at 164 ("plain error" rule for criminal direct appeal inappropriate for defaulted claim on collateral review). There are significant differences that warrant a greater reluctance to reopen a completed habeas case.

First, habeas corpus is *itself* a collateral attack on a judgment. The habeas petitioner's injury, if any, stems not from the denial of habeas relief, but rather from the original criminal judgment. A petitioner's Rule 60 motion or a motion to recall the mandate in a habeas case is, in effect, a collateral attack squared.

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8. Congress has apparently used the word "successive" to mean "third, fourth, fifth, etc.," rather than the usage which distinguished "successive" from "abuse of the writ." Cf. *Sawyer* v. *Whitley*, 505 U. S. 333, 338 (1992).

A second, related difference is that, unlike a civil judgment, denial of habeas relief is not res judicata. *Salinger* v. *Loisel*, 265 U. S. 224, 230 (1924). Restrictions on repeated petitions have grown tighter, to be sure, in response to the growing abuse of them. See *McCleskey*, 499 U. S., at 496 (cause and prejudice standard adopted to prevent abuse); 28 U. S. C. § 2244(b). Yet these restrictions come with exceptions in order to balance the competing interests. Because the res judicata bar is less rigid than in civil cases, the need for relief from judgment is reduced. A second petition is available as an alternative in those cases where Congress has determined that a second round is appropriate.

Conceivably, there may be cases where Rule 60 is appropriate for "informing" the decision of the court of appeals, cf. *Felker*, 135 L. Ed. 2d, at 839, 116 S. Ct., at 2339, or for direct invocation by the district court. For example, Rule 60(b)(3) directly addresses fraud by a party, while the successive petition rule would include that issue only obliquely under newly discovered facts. See 28 U. S. C. § 2244(b)(2)(B)(i). In the present case, though, the successive petition rule is squarely on point. The mandate was recalled for the purpose of reconsidering an issue already considered, decided, and rejected in a final disposition of the first habeas petition. Congress has already asked and answered the question of whether such decisions should be reconsidered. The answer is no. *Id.*, subd. (b)(1).

III. Use of a general power with undefined limits, when a specific rule directly addresses the competing interests, is an abuse of discretion.

Lonchar v. *Thomas*, 517 U. S. ___, 134 L. Ed. 2d 440, 116 S. Ct. 1293 (1996) is the precedent most closely analogous to the present case. That case involved the unusual circumstance of a *first* federal petition filed at the eleventh hour before execution. The Court of Appeals had vacated a stay of execution based on " 'equitable doctrines independent of Rule 9.' "

Id., at 448, 116 S. Ct., at 1296 (quoting *Lonchar* v. *Thomas*, 58 F. 3d 590, 592 (CA4 1995) (*per curiam*).)[9]

Rule 9 says nothing about stays. Rule 9 governs dismissal of petitions, as does Rule 4. Stays are governed by 28 U. S. C. § 2251, which grants the power in permissive terms ("A justice or judge . . . *may*, . . . stay any proceeding . . . ." (emphasis added)), without specifying the criteria for its exercise. See also *Lonchar*, 134 L. Ed. 2d, at 459, 116 S. Ct., at 1304 (Rehnquist, C.J., concurring in the judgment) (discussing why the statute is not specific).

Despite the lack of constraints on the stay power, the majority held that it was improper to use that broad, undefined power to upset the balancing of interests embodied in Rule 9. "That is, if the district court lacks authority to directly dispose of the petition on the merits, it would *abuse its discretion* by attempting to *achieve the same result indirectly* by denying a stay." *Id.*, at 449, 116 S. Ct., at 1297 (emphasis added).

This principle applies squarely to the present case. The undeniable "bottom line" of this case is that the mandate was recalled to reconsider a mixed question of law and fact which had been resolved in a final decision. The state's interest in the finality of this completed round of habeas review is the same in this case as in any other capital case. The habeas petitioner's interest in seeking further review is also the same. The only factor missing from the first round was a vote on whether to take the case en banc. But en banc rehearing, or even a vote on it, is not an ordinary part of the review process. See *ante*, at 4-9. Hence, this case had been through all the normal levels, and the balancing of interests regarding further review should be the same as in any other case.

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9. Undesignated citations to "Rule" in this part are to the Habeas Corpus Rules, *i.e.*, Rules Governing Section 2254 Cases in the United States District Courts, 28 U. S. C. § 2254, pp. 415-432 (1988 ed.).

The clear message of *Lonchar* is that when a balance has been struck and a rule established, whether by statute, court rule, or precedent, that balance is not to be disturbed by an end-run around the rule. "First, the history of the Great Writ of Habeas Corpus reveals, not individual judges dismissing writs for ad hoc reasons, but, rather, the gradual evolution of more formal judicial, statutory, or rules-based doctrines of law." *Lonchar*, 134 L. Ed. 2d, at 450, 116 S. Ct., at 1298. Early rules were simple because the issues were simple. *Ibid.* As the writ expanded into an ever-broader attack on judgments of competent courts,

> "Congress, the Rule writers, and the courts have developed more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise. . . . These legal principles are embodied in statutes, rules, precedents, and practices that control the writ's exercise. Within constitutional constraints they reflect a *balancing of objectives* (sometimes controversial) which is normally *for Congress* to make, but which courts will make when Congress has not resolved the question." *Ibid.* (emphasis added).

Lonchar then goes on to warn of the dangers of "chancellor's foot" jurisprudence and "ad hoc departure from settled rules." *Id.*, at 451, 116 S. Ct., at 1298-1299. Most importantly, though, *Lonchar* stresses that a specific enactment "directly addresses the primary factor" that prompted the Court of Appeals' action in that case. *Id.*, at 453, 116 S. Ct., at 1300. Rule 9(a) permits dismissal of a delayed petition, but only on a showing of prejudice, which had not been made in that case.

"But the history of the Rule makes plain that the prejudice requirement represents a critical element in the *balancing of interests undertaken by Congress* and the framers of the Rule *which courts may not undermine through the exercise of background equitable powers.*" *Ibid.* (emphasis added). *Lonchar* further noted that Congress had specifically rejected a weakening of the prejudice requirement. *Ibid.* If the rule on

delayed petitions was too weak, that weakness had to be addressed through legislation or the rule-making process,[10] and not by "amending the Rule, in effect, through an ad hoc judicial exception, ..." *Id.*, at 454, 116 S. Ct., at 1301. These words could just as well have been written for the present case.

While *Lonchar* is the case most closely on point, it is by no means the only case prohibiting the use of a general power to evade a specific rule. In *Gomez* v. *United States Dist. Court for the Northern Dist. Cal.*, 503 U. S. 653, 653 (1992) (*per curiam*), Robert Harris, a death row inmate who had previously litigated multiple habeas petitions, brought a 42 U. S. C. § 1983 action challenging the use of the gas chamber. "This action is an obvious attempt to avoid the application of *McCleskey* v. *Zant*, 499 U. S. 467 (1991), to bar this successive claim for relief." *Ibid.* Even if the *McCleskey* rule was not strictly applicable, Harris' "abusive delay" in not raising the claim earlier was sufficient to deny equitable relief. The equitable principles underlying the *McCleskey* rule applied "regardless of the technical form of the action." *Lonchar*, 134 L. Ed. 2d, at 454-455, 116 S. Ct., at 1301.

In several cases, this Court has reversed a lower court's invocation of "supervisory power" to evade the balancing of interests struck by a more specific rule. In *United States* v. *Payner*, 447 U. S. 727, 735-736 (1980), it was the rule of Fourth Amendment standing. In *United States* v. *Hasting*, 461 U. S. 499, 506-509 (1983), it was the constitutional harmless error rule. In *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 254-255 (1988), it was the harmless error rule of Federal Rule of Criminal Procedure 52(a). In each case, the precedent or rule had been based on a balancing of the competing interests, and the standard had been set with regard to achieving a balance. A federal court cannot be permitted to strike its own balance by invoking a general power.

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10. Congress did exactly that later the same month. 28 U. S. C. § 2244(d) (one year period of limitation).

For reconsideration of previously rejected claims in habeas corpus, a balance was struck first in case law and later by statute. Under pre-Act case law, the same two-prong standard applied to successive, abusive, and defaulted habeas claims: the petitioner must show either "cause and prejudice" or "actual innocence." *Sawyer* v. *Whitley*, 505 U. S. 333, 338-339 (1992). The latter prong would include a showing that, even though guilty of murder, defendant was not eligible for the death penalty. *Id.*, at 336.

Congress decided to shift the balance further in the direction of finality. "Abusive" petitions, *i.e.*, with new claims not considered in the first round, are limited to two categories. First, there are new rules that this Court has held to qualify for retroactive application, an empty set up to this point. 28 U. S. C. § 2244(b)(2)(A).[11] Second, there are claims for which there is *both* a particular kind of "cause," inability to discover the factual predicate, *and* "actual innocence" of the *underlying offense*, not just an eligibility circumstance. 28 U. S. C. § 2244(b)(2)(B).

For "successive" claims, though, Congress struck even harder. "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." *Id.*, subd. (b)(1). No exceptions. This "modified res judicata rule" is well within the power of Congress to enact. *Felker* v. *Turpin*, 518 U. S. ___, 135 L. Ed. 2d 827, 840, 116 S. Ct. 2333, 2340 (1996). It represents a very strong statement by the legislative authority regarding the appropriate balance of finality versus protection of criminal defendants.

The greatest danger of injustice to the defendant lies in the concealment of facts, not disagreements of law. If a case such

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11. Since *Teague* v. *Lane*, 489 U. S. 288 (1989), this Court has never found a new rule that qualifies for either of its exceptions, although it has noted that some earlier-created rules would have qualified. See *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) (citing *Gideon* v. *Wainwright*, 372 U. S. 335 (1963)).

as *Mooney* v. *Holohan*, 294 U. S. 103, 110-111 (1935) were to arise today, no judge would doubt that the allegations, if proven, would entitle the petitioner to relief. Where allegations of such grave injustice are made, the law is clear, and the only question is the factual one of whether the allegations are true. See *In re Mooney*, 10 Cal. 2d 1, 85, 73 P. 2d 554, 596 (1937). Congress has therefore left the door partially open to new claims based on facts which could not have been discovered earlier.

On the other hand, the greatest danger of injustice to the people lies in disagreements among judges on borderline questions of law. The real Bill of Rights is now padded by so many layers of case law[12] that issues on which conscientious judges differ today are necessarily far removed from the core. A claim rejected in the first round by both state and federal courts has only an infinitesimal chance of being a fundamental injustice. The danger to the state of wrong decisions on the fringes, however, is great. Furthermore, a third round of consideration of a claim already rejected twice is far beyond the demands of any semblance of due process. It is overdue process. Weighing the great costs against the minimal benefits, Congress decided to flatly prohibit this type of review.

In its opinion, the en banc majority disclaims any reliance on newly discovered facts. *Thompson* v. *Calderon*, No. 95-99014, 1997 WL 441835, *2, J. A. 214 (CA9 1997) (en banc). What happened in this case was purely reconsideration, on the same record, of arguments of law previously considered and rejected in an otherwise final decision, exactly what Congress sought to prohibit. Article III of the Constitution was crafted with the understanding "that 'a judgment conclusively resolves the case' because 'a "judicial Power" is one to render dispositive judgments.' " *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 219 (1995) (quoting Easterbrook, Presidential

12. See *Davis* v. *United States*, 512 U. S. 452, 462 (1994) (noting multiple layers of "prophylaxis"); *Rose* v. *Lundy*, 455 U. S. 509, 544-545, and nn. 9-13 (1982) (Stevens, J., dissenting) (noting "fundamental" rules, none newer than 1963).

Review, 40 Case W. Res. L. Rev. 905, 926 (1990)). There are exceptions, but those exceptions are set down in advance in statutes and rules. See *id.*, at 227 ("Finality of a legal judgment is determined by statute . . ."). To bypass those standards and make up a new exception ad hoc is, at the very least, an abuse of discretion.

IV. The en banc court's conclusion regarding ineffective assistance is based in part, on an unjustified assumption about rape.

A. Rape, Consent, and the Forensic Evidence.

The question added by this Court's order of August 26, regarding the en banc court's holding that the three-judge panel "committed fundamental errors," is largely case-specific and beyond the scope of this *amicus* brief. There is, however, one aspect of the decision that could cause enormous harm to future victims of rape.

> "At the evidentiary hearing before the district court, Thompson presented the testimony of Dr. Root, an independent pathology expert whom [trial counsel] Brower had consulted, but had not called as a witness . . . .
>
> "Root further testified that the coroner's report showed that there was no semen drainage in the crotch of Fleischli's tight jeans, which were zipped and belted and which she wore without underpants.[13] Fleischli's vaginal swab revealed recent semen with 'infrequent' sperm. Both the lack of drainage and the infrequent sperm suggested that Fleischli had douched or washed after sex, *consistent with consensual sex but not with rape followed by murder*."

13. The en banc majority's assumption that Ginger Fleischli wore her pants that way, rather than the alternative possibility that the rapist/murderer dressed the body that way after death, is another unjustified assumption.

Thompson v. *Calderon*, No. 95-99014, 1997 WL 441835, *7, J. A. 222 (CA9 1997) (en banc) (emphasis added).

This passage makes an enormous leap from the forensic evidence to the conclusion that it is inconsistent with rape. First, the forensic indication that the victim's vaginal area was washed does not indicate at all who washed it. Thompson may very well have done that himself, before or after he murdered Ginger Fleischli, in an effort to inhibit identification. We know that the murderer in this case made one ineffective attempt to wash away evidence. See *People* v. *Thompson*, 45 Cal. 3d 86, 99, n. 8, 753 P. 2d 37, 43, n. 8 (1988) (carpet). A second such attempt is entirely plausible. Although DNA testing was not widely used at the time of the crime, blood typing was widely used to narrow the pool of suspects, and it was used in this case. See *id.*, at 98, 753 P. 2d, at 43.

Second, even if the victim did wash herself, the inconsistency of that action with rape is far from apparent. Rape victims often have a strong psychological need to wash. This is a very common immediate response to rape. See S. Estrich, Real Rape 21 (1987). Here is one victim's first-hand account:

> "I locked the door and I cried. Then I went into the bathroom and I took a bath and I took a shower and another bath and another shower . . . . I felt dirty and violated. I didn't want to leave the bathroom, so I just sat on the floor with my towel around me, crying." R. Warshaw, I Never Called It Rape 69 (1988).

The en banc majority's assumption that washing is inconsistent with "rape followed by murder" could only be based on the assumption that a rapist/murderer would not permit the victim to wash. The opinion gives no justification for this assumption. The dissent has the better argument.

> "The majority thinks this shows the sex was consensual, but a jury could have inferred the opposite, that if a rape victim persuaded the perpetrator to let her go to the bathroom, she would wash away the crime from the inside and outside of her body as best she could, in whatever time she had." 1997 WL 441835, *28, J. A. 270 (Kleinfeld, J., dissenting).

This is a case of "acquaintance rape" or "date rape." Ginger Fleischli knew defendant, had been out drinking and dancing with him, and had gone voluntarily to his apartment. 45 Cal. 3d, at 97-98, 753 P. 2d, at 42. In acquaintance rape situations, it is not unusual for the rapist to engage in some sort of accommodating behavior after the rape. See Warshaw, *supra*, at 28, 37 (first-hand accounts, driving the victim home); *id.*, at 32 (helping her get dressed). In this case, of course, the rapist subsequently murdered the victim, but that fact is not necessarily inconsistent with permitting her to wash.

Victims of acquaintance rape already suffer greatly from "an almost systematic downgrading or dismissing" of their cases. Estrich, *supra*, at 18. A precedent that a minor accommodation by the rapist should be regarded as compelling evidence that the sex was consensual is factually wrong and potentially disastrous. This inference should be expressly rejected.

B. Ineffective Assistance and Trial Strategy.

The majority's assumption that washing is inconsistent with rape depends on speculation as to what happened between Thomas Thompson and Ginger Fleischli. Only two people know for certain. One is dead and the other has continually lied. See 1997 WL 441835, *28, J. A. 270 (Kleinfeld, J., dissenting); *post*, A-9 to A-11 (Gov. Wilson's decision). Far from being compelling for the defendant, the "washing" evidence is barely relevant. Evidence is relevant only if it tends to prove or disprove a fact of consequence. Cal Evid. Code § 210; cf. Fed. Rules Evid. 401. The evidence omitted in this case can be argued just as strongly in favor of rape as against it, perhaps more strongly.

In addition to the cold logic of the matter, there is the emotional factor to consider. In pondering the probative value of this forensic evidence, the jury would have to put itself inside

the mind of Ginger Fleischli. It would have to think about the circumstances under which she washed herself, if she did it herself, possibly begging for a minor accommodation from a man who had just raped her and would shortly kill her. It is a chilling thought, and a defense lawyer would be well within the bounds of acceptable strategy to avoid it.

The minimal probative force of this evidence and its potential for backfire negate both prongs of the *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984) test. An attorney's decision not to put on such evidence neither falls below the standard of performance nor renders the result unreliable.

In establishing the standard for ineffective assistance claims, the *Strickland* Court noted, "Judicial scrutiny of counsel's performance must be highly deferential." *Id.*, at 689. Furthermore, "strategic choices made after thorough investigation of law and facts relevant to plausible options are *virtually unchallengeable* . . . ." *Id.*, at 690 (emphasis added). The opinion below is a perfect illustration of how these admonitions are often ignored in order to overturn death sentences.

Defense attorney Brower consulted Dr. Root and decided not to use him as a witness. *Thompson* v. *Calderon*, 1997 WL 441835, *7, J. A. 222 (CA9 1997) (en banc). The fact that Brower did not recall, a decade after the trial, learning of a marginally relevant piece of evidence, see *ibid.*, does not make his investigation inadequate on this point. Dr. Root testified to this fact at the habeas hearing and presumably he informed Brower of it in his report to Brower. Brower's choice not to use Dr. Root was a reasonable choice.

The original panel decision correctly applied the "highly deferential" standard of *Strickland*. That decision was not error at all, much less "fundamental error." There was no justification for recalling the mandate on that basis.

CONCLUSION

The decision of the Ninth Circuit en banc should be reversed.

September, 1997

Respectfully submitted,

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APPENDIX A

IN THE OFFICE OF THE GOVERNOR
STATE OF CALIFORNIA

In the Matter of the Clemency Request of THOMAS MARTIN THOMPSON	)	DECISION

I. Introduction

On the night of September 11, 1981, in the studio apartment of David Leitch and the defendant, Thomas Martin Thompson, twenty-year-old Ginger Fleischli was stabbed five times in the head near her right ear. Thompson was admittedly in the apartment at the time of the murder. The knife penetrated two and a half inches through Ms. Fleischli's ear, rupturing her carotid artery and causing massive bleeding and her death. Her body was found two days later, unceremoniously dumped in a grove of trees near an interstate highway, and wrapped in an old sleeping bag and a pink blanket that was traced to Mr. Thompson's apartment.

On November 4, 1983, a jury convicted Thomas Martin Thompson of the rape and first-degree murder of Ginger Fleischli. Finding that the murder occurred in the course of committing the rape, the jury unanimously recommended the death penalty. Another jury convicted David Leitch, Thompson's roommate, of second-degree murder for aiding and abetting Ms. Fleischli's death.

By petition dated July 10, 1997, Mr. Thompson, citing "new evidence," now seeks a commutation of his death sentence, primarily on the grounds that he is innocent of rape. Despite the skillful job done by Thompson's lawyers, his claim of innocence is ultimately premised on an inherently incredible

explanation of events—that he had consensual sex with the victim and then managed to sleep through a struggle, the murder, an elaborate wrapping of the victim's head and body, and an extensive carpet scrubbing to remove her blood—all occurring within six to seven feet of him. Strikingly, this version of events is inconsistent with the facts, including that the victim was found with her shirt and bra cut in front and pulled down to her elbows in a restraining position consistent with rape. And the "new" evidence which Thompson proffers to show his innocence of rape was recently characterized by the U.S. District Court as "one version of events, offered sporadically over the years by [Thompson's] co-defendant Leitch, which is *contradicted* both by some of Leitch's other statements, as well as the compelling physical evidence of rape."[1] [Emphasis added.] A plea for clemency, premised on the basis of the defendant's continued adherence to an inherently incredible and contradictory alibi, cannot be honored without dishonoring the jury, the courts, and the system, which, with painstaking care over a fifteen-year period, found and affirmed Thompson's guilt.

II. The Basis For The Clemency Petition

Mr. Thompson's clemency petition argues (1) that evidence not presented at trial "points [to] Mr. Thompson's innocence" (Petition, pp. 4-5, 21-38); (2) that a commutation is warranted because he has no prior criminal record and has been a model prisoner (*id.* at 2, 16-21); and (3) that it would be unfair to execute him when his co-defendant was convicted of only second-degree murder and received a lesser sentence (*id.* at 38-40).

In considering Mr. Thompson's clemency application, I have carefully reviewed the materials submitted on his behalf, the petition and letters signed by supporters of clemency, the submissions of the Orange County District Attorney, the letters

1. *Thompson* v. *Calderon*, CV 89-3630 DT (C.D.Cal. July 25, 1997).

of the trial judge concerning clemency, the judicial decisions of the California Supreme Court, the U.S. District Court, and the Ninth Circuit Court of Appeals, portions of the trial transcripts, and the materials and recommendation provided to me by the Board of Prison Terms. Finally, on July 29, 1997, at the request of Mr. Thompson's attorneys, I personally met with them and prosecutors from the Orange County District Attorney's Office for two hours while each side presented their arguments concerning clemency.

III. Factual Background

On the evening of Friday, September 11, 1981, in Laguna Beach, Thomas Thompson and his roommate David Leitch encountered at a restaurant two acquaintances: Leitch's ex-wife Tracy Leitch and Tracy's new roommate Ginger Fleischli. The previous month, Ginger Fleischli had moved out of David Leitch's apartment, and Thompson had moved in.

The foursome then drove to a bar. At trial and following cross-examination, Tracy Leitch admitted that at that bar, Ginger Fleischli had prophetically asked her, "Do you think David [Leitch] would have Tom [Thompson] kill me?" After Tracy and David Leitch left, Ginger Fleischli and Thompson remained at the bar and were subsequently joined for drinks by Afshin Kashani. The three moved to another bar, where Thompson and Kashani drank and smoked hashish.

Around 1:00 a.m., the three walked back to Thompson's (and Leitch's) apartment on Ocean Front in Laguna Beach. Around 2:00 a.m., Ginger Fleischli left to get a soda from a nearby liquor store.

In her absence, Thompson told Kashani that he wanted to be alone with Ms. Fleischli that weekend. Kashani obligingly left the apartment, but on the way to his truck, he realized that he had left his cigarettes. When he returned to Thompson's apartment, the door was open and Thompson seemed nervous,

handing Kashani's cigarettes out to him through the door rather than inviting him back into the apartment.

Thompson admits that Ms. Fleischli returned to the apartment, but claims he had consensual sex with her, and then passed out and fell asleep. At trial, Thompson called witnesses claiming he was a heavy sleeper. Later, however, he also testified that [he] had been awakened at the time of his arrest in Mexico by the sound of police cocking the hammers of their revolvers pointed at his head.[2]

The next morning, on September 12, Thompson claims he woke up to find David and Tracy Leitch in the apartment. Tracy Leitch asked Thompson where Ginger Fleischli was. According to Tracy Leitch, Thompson lied and said that Ms. Fleischli and Kashani had left the bar together. (R.T. 1573.)[3]

That evening, according to Tracy Leitch, she encountered Thompson at a party and expressed concern about Ms. Fleischli's whereabouts. Although her body had not yet been discovered, Thompson referred to Ms. Fleischli in the past tense, saying that he had liked her and that she was a nice girl.

The following day, Tracy Leitch filed a missing person's report with the Newport Beach Police Department.

Ms. Fleischli's body was found on September 14, 1981 in a grove of trees near Interstate 5. The footprints of two people were found near the body. One footprint, made by a rippled or wavy soled shoe, was of the same size and pattern as a pair of shoes worn by David Leitch that month. The other footprint was different—made by a smooth soled shoe. The body was wrapped in an old sleeping bag and a pink blanket, which were

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2. The prosecutor observed at trial that this sound seems to have disturbed Thompson's sleep, although he claimed the murder of Ms. Fleischli just a few feet away did not awaken him. Thompson at that point amended his story to claim that Mexican authorities had also shaken him awake. *People* v. *Thompson*, 45 Cal.3d 86, 101 n.12 (1988).

3. All references to "R.T." refer to the reporter's transcript of the trial.

traced to Thompson's and Leitch's apartment. Fibers found on the body matched the carpet in the Ocean Front apartment. The evidence suggests that her body had been transported in David Leitch's car: A red smear on the rope wrapped around the body matched paint from the trunk of Leitch's car, and fibers from the pink blanket matched fibers found in the trunk of Leitch's car.

Fleischli's head was wrapped with silver duct tape, two towels, a sheet, and her jacket. Her shirt and bra had been cut in front and pulled down to her elbows. Her jeans were fully zipped, but not buttoned. She wore no underwear, shoes, or socks, and a vaginal swab revealed the presence of semen consistent with Thompson's blood type.

Fleischli had been stabbed five times in the head near her right ear. One of the stab wounds, inflicted with a single-edged knife, penetrated the ear two and one-half inches, severing the carotid artery and causing her death. Fleischli's ankles, hands, wrists, and left elbow showed bruising, at least some of which clearly occurred around the time of the murder. She had sustained an injury to her right wrist, which was consistent with the use of handcuffs, which were found in Thompson's possession upon his arrest.

Investigators discovered the victim's blood in the carpet at the Ocean Front apartment. Indeed, on September 12, the day of the murder, Tracy Leitch had noticed that the carpet in the apartment was wet, since she had gotten a damp stain on her pants from kneeling on the carpet. Despite an apparent attempt to clean it up, however, blood remained on the back of the carpet, carpet padding, and the cement slab floor beneath.

Around the time that Fleischli's body was discovered, Thompson and David Leitch went to Mexico, purportedly to get a boat in order to engage in a venture smuggling Vietnamese refugees from Thailand in return for gold. Leitch later pawned his car and returned to the U.S. and was arrested.

Thompson stayed in Mexico. He was arrested in Cabo San Lucas, Mexico on September 26, 1981. Handcuffs were found in his possession. And Thompson appeared to know that the victim had died of stab wounds to the head, even though the media had not released this information. When confronted with this, Thompson claimed that David Leitch had told him this before he left Mexico.

At trial, two jailhouse informants testified that Thompson had confessed to the rape and murder while in jail.

IV. Analysis

A. Thompson's Challenges To The Jury's Findings Of Guilt

Mr. Thompson's primary basis for clemency is that "new evidence, added to the evidence presented in the federal proceedings ... establishes that Thompson did not rape Ms. Fleischli" and "that he is innocent of capital murder, which is based solely on the rape." (Clemency petition, p.26). He challenges the evidence considered by the jury (*id.* at 29-32); cites as new evidence David Leitch's testimony at a parole hearing that he observed Thompson and Ms. Fleischli having consensual sex (*id.* at *3-4, 25);* raises questions about the veracity of the jailhouse informants (*id.* at 32-36); and contends that the closing arguments in the two trials of Thompson and Leitch were inconsistent, thereby raising further doubts as to the true facts (*id.* at 28-29, 36-37). As further proof that there are serious doubts as to his guilt, he points to the amicus brief filed by seven former prosecutors raising doubts about his convictions (*id.* at *5-6,* 23-25) and the statement of two jurors stating they have "some doubt" whether Thompson raped Ms. Fleischli (*id.* at 5).

The amicus brief of the seven former prosecutors and the statement of the two jurors 14 years after they reviewed the evidence must be viewed in proper perspective. Not only did the U.S. Supreme Court deny the relief sought by the seven former prosecutors, but the amicus brief was not drafted by the

prosecutors, but primarily by Thompson's counsel—a fact confirmed at the oral presentations before me on July 29. And a news account reports that at least several of these former "prosecutors" are, in fact, criminal defense counsel or opposed to the death penalty. *See* "Defender Quizzed on the Use of Ex-Prosecutors," *Los Angeles Daily Journal,* July 21, 1997, pp. 1, 10.

As for the statement of the two jurors expressing doubt over the rape conviction, this statement was signed 14 years after the jurors had reviewed the evidence, and was based on a one-sided presentation to those jurors by a defense investigator concerning the new evidence that was presented in federal court. As was confirmed at the oral presentations held on July 29, the jurors were not provided with all the prosecution evidence presented at the federal proceeding. Nor was the prosecution given an opportunity to present its position to those two jurors. A statement signed under such circumstances can hardly be considered a fair or reliable indicator of Thompson's guilt.

Rather than relying on this statement or on an amicus brief, I must determine whether Thompson's evidence establishes that "he is innocent of capital murder." (Petition, p. 26). However, a clemency proceeding is not another judicial proceeding in which to relitigate claims already raised in, and fairly addressed by, the courts. Rather, clemency is a historic remedy for preventing a miscarriage of justice where the judicial process has been exhausted. *Herrera* v. *Collins*, 506 U.S. 390, 113 S.Ct. 852, 122 L.Ed.2d 203 (1993). Thompson must show that a failure to overturn the verdict of the jury, who, after all, heard his testimony and viewed the available evidence, would be a miscarriage of justice in light of the "new" evidence.

No miscarriage of justice has occurred here. First, the trial judge who presided over both the trials of Thompson and Leitch and personally viewed the evidence, has advised me:

> *There is in reality absolutely no doubt about the crucial facts:* It was Thomas Thompson who

> handcuffed the victim, cut her clothes down her front and pulled them to her sides, and raped her. When he was through, he plunged a knife five times into the right side of her head, one stab wound penetrating 2 and a half inches into her skull, cutting the carotid artery ... . *These facts were proven beyond any possible doubt at his trial.* [Emphasis added.]

The judge concluded: "It would be an absolute tragedy and a travesty of justice to even seriously consider clemency in this case."

Second, the evidence of Thompson's guilt in the rape and murder of Ms. Fleischli is strong. Thompson admitted at trial that Ms. Fleischli had returned to the apartment and that he and she were alone. He admits that he had intercourse with Ms. Fleischli, albeit claiming it was consensual. The victim, of course, is in no position to refute this. But the physical evidence does: Her shirt and bra were cut in front and pulled down to her elbows "placing her in a position consistent with restraint during a rape," *see Thompson* v. *Calderon,* 109 F.3d 1358, 1365 (9th Cir. 1996); her body was found without underwear, shoes, or socks; her Levis were fully zipped but not buttoned; and her mouth had been gagged with duct tape. (*See* R.T. 1505, 1772.) Nor does Mr. Thompson's explanation—upon which he now seeks to overturn the jury's verdict of rape—comport with the evidence. Despite his testimony that Ms. Fleischli began to dress after they had "consensual" intercourse (R.T. 2322), her body was found without any underwear, shoes, or socks. Does Mr. Thompson expect us to believe that she was not raped, but that the murderer decided to remove her underwear and unbutton her jeans after stabbing her?

These undisputed facts are strong evidence of rape and belie Thompson's explanation of events. But additional facts—which Thompson seeks to relitigate before me—also point to his culpability: At trial, a deputy sheriff who had seen hundreds of handcuff injuries, testified that the injury to Ms. Fleischli's right wrist was consistent with an injury inflicted by

handcuffs—which Thompson had in his possession upon his arrest. And two jailhouse informants testified that Thompson confessed to the rape and murder.[4]

Indeed, the lack of merit of Thompson's plea for clemency is demonstrated by the fact that his claim of innocence is ultimately premised on an alibi that is inherently incredible: His position is that he had consensual sex with Ginger Fleischli and then slept while she was attacked and murdered only some six feet away from him. He slept while she was stabbed numerous times in her head. He slept undisturbed, while silver duct tape was unrolled and wound around her head. He slept on while her head was further wrapped with two towels, a sheet, and her jacket. He slept while her body was wrapped in a blanket and a sleeping bag, tied with a rope, and carried down to his co-defendant's car. He even slept while the murderer returned to the apartment and doused and scrubbed the carpet to remove the victim's blood that had soaked into it. Yes, Mr. Thompson claims he was asleep through all this commotion—despite the fact that only 14 days later, when he was arrested in Mexico, he was roused from his sleep by the click of the hammers of police revolvers being cocked near his head.

Moreover, although Mr. Thompson claims he had no knowledge that anything was amiss with Ms. Fleischli until several days later, on the evening following the murder, Mr. Thompson spoke of Ms. Fleischli in the past tense, telling Tracy Leitch that he had liked her and that she was a nice girl.

Significantly, Mr. Thompson's claim of his innocence is further undermined by the fact that he has continually lied—and

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4. Thompson takes exception to the testimony of the informants, Fink and Del Frate, and contends that his original counsel could have more effectively impeached them, based on their history of providing information to law enforcement in return for favors. However, this contention was thoroughly rejected by the Ninth Circuit. *Thompson* v. *Calderon*, 109 F.3d 1358, 1369 (9th Cir. 1996). The Ninth Circuit ruled that Thompson's counsel discredited Fink and "could hardly have impeached Del Frate more than he did." *Id.*

been caught—throughout this matter. At the oral presentation held before me on July 29, the prosecutor aptly observed that Thompson's testimony was the moment of truth at the trial since it gave the jury the opportunity to see whether Thompson was credible in making his incredible alibi that he slept while the victim was murdered and her body disposed of. On the stand at trial, Mr. Thompson was forced to admit that he had lied to police in the tape-recorded statement that he had made shortly after his arrest:

> Q. Let me clarify Saturday morning, September 12 [the morning after the murder]. Did you, or did you not, say Ginger left with Shawn [Kashani] to Tracy?
>
> A. I did not, sir.
>
> Q. Then why did you tell that to [police investigators] Owen and Coder?
>
> A. Because at that time, as I said before, he [Shawn] seemed as likely a candidate as anybody.
>
> Q. So you lied about that too?
>
> A. I did, sir.
>
> R.T. 2380.

At trial, Thompson was asked why he told the police that he was "thinking self-preservation" when Tracy Leitch asked him on the morning following the murder what happened to Ginger Fleischli. This was a time, after all, when he allegedly had no knowledge that anything was amiss with Ginger Fleischli. He had no explanation:

> Q. So what you're telling us, you didn't do anything wrong; you had no knowledge of any wrongdoing, what happened to Ginger Fleischli, but you lied to the police about what happened; you didn't tell Tracy what Ginger's plans were, and you're worried about self preservation when Tracy asked you where Ginger is.

> That doesn't sound very innocent to me, Mr. Thompson.
>
> A. That's your job to point that out, sir.
>
> R.T. 2385.

Mr. Thompson, in the words of a psychiatrist who examined him, is a "manipulator in the first order" and "a liar of the first magnitude"—someone who has "been more interested in how to manipulate and get himself out of jams ... than he has been in long-range thinking and planning." (Crinella Testimony, R.T. 2816, 2818, 2821.)

The jury did not believe Mr. Thompson was telling the truth about sleeping through the murder or having consensual sex. I will not overturn the jury's assessment, based on their first-hand observation of Thompson at trial, when his claim of innocence, far from demonstrating innocence, is based on an inherently incredible story told by someone who has admittedly lied about the events in issue.

However, Mr. Thompson claims that "startling new" evidence now corroborates his claim of innocence. (Petition at 3-5, 25-26). He states that "in January, 1995, Mr. Thompson's co-defendant, David Leitch, testified at his parole hearing ... that he had returned to his apartment only an hour or so before Ms. Fleischli died, had walked through the unlocked door and had seen Mr. Thompson and Fleischli having consensual intercourse." (Petition at 3-4). This "startling" new evidence provides absolutely no help to Thompson. Leitch never said that the intercourse was "consensual" at the parole hearing; he was not even in a position to know whether what he allegedly saw was consensual; he gave contrary versions both before and after the parole hearing; and this supposedly exonerating version is itself inconsistent with Thompson's own version of the facts.

First, Leitch never stated that the intercourse was consensual at the parole hearing. Instead, at the hearing on January 4, 1995, Leitch stated, "when I came in the apartment earlier, it

looked like somebody were [sic] having sex in the middle of the apartment, so I left, and I came back later." Only four pages later in the hearing transcript, Leitch speculated that Thompson did rape Ms. Fleischli: "... The only thing I can come up with is that he raped her and then didn't want her—her to tell." (Parole Hearing Transcript, January 4, 1995, p. 61.) His speculation of rape demonstrates that his testimony cannot and should not be construed to mean that the sex was "consensual."

Second, this evidence is not even probative of Thompson's innocence of rape. Leitch admits he had been drinking all night and that his "judgment was way off." He admits that he only had a brief view from the "end of a corridor." *Id.* at 57. As the U.S. District Court, which also recently reviewed this evidence, concluded: "Leitch's purported observation [is not] dispositive on the issue of consent based on his brief view." *Thompson* v. *Calderon*, CV 89-3630 DT (C.D.Cal. July 25, 1997).

Third, this inconclusive statement from Leitch—the core of the "new" evidence—was given under questionable circumstances and contradicts his other statements, both before and after this one. Leitch's statement at the parole hearing—from which Thompson's counsel infers consensual sex—was made by Leitch to explain away his ability to identify the victim despite her taped and wrapped condition when he allegedly encountered her body in his apartment. Leitch was asked how he could know that the wrapped body was Fleischli's and he responded that he knew because he had come into the apartment earlier and glimpsed the two having sex. Significantly, Leitch raised this publicly for the first time at his parole hearing—after conviction when disclosure of his presence at the murder scene was too late to jeopardize him but in time to help Thompson avoid the death penalty. The credibility of Leitch's statement must be viewed both in that light and in light of the trial judge's description of Leitch as a "conniving individual."

Further, Leitch has given conflicting versions of his presence at the murder scene throughout this matter. His first version was that he had gone to his apartment on the night of

the murder and that neither Thompson nor Ms. Fleischli was there. In another version, Leitch stated that he had returned to the apartment to find Ms. Fleischli dead and wrapped in a blanket. And at his most recent parole hearing, he testified that he had returned to the apartment to find Ms. Fleischli dead. Interestingly, Leitch never mentioned seeing Thompson engaged in consensual sex during his conversations with Tracy Leitch during her visits to him in jail, which were recorded by prison officials without Leitch's knowledge. Instead, he claimed Thompson raped her.

Finally, this supposedly exonerating version conflicts with Thompson's alibi. Leitch stated that Thompson and Ms. Fleischli were having sex "on the floor." (Parole Hearing Transcript at 57-58.) But Thompson testified that he had consensual sex with Ms. Fleischli on his bunk, which was located against the wall. Accordingly, the newly discovered evidence does not help Mr. Thompson: It is inconsistent with Thompson's alibi, and Leitch did not state the sex was consensual and was not in a position to know, and has contradicted this statement. As the U.S. District Court, which recently considered this "new" evidence, ruled, Thompson "certainly has not made the persuasive demonstration of actual innocence that is required to establish that a fundamental miscarriage of justice will result if the State of California is permitted to execute him." *Thompson* v. *Calderon*, CV 89-3630 DT (C.D.Cal. July 25, 1997).

B. Thompson's Absence Of A Criminal Record

Mr. Thompson's petition also argues for clemency on the basis of his lack of a prior criminal record and his "positive adjustment to prison life." The short answer is that this heinous murder cannot be mitigated simply because he had not murdered before.

Moreover, in considering whether to recommend the death penalty, Mr. Thompson's jury already weighed his lack of a prior criminal record as one mitigating factor. *See People* v.

Thompson, 45 Cal.3d at 122. Ultimately, the jury concluded that the aggravating factors so far outweighed the mitigating factors that the death penalty was appropriate.

Finally, the fact that Thompson may have made a "positive" adjustment to prison and has an "excellent" disciplinary record (Petition at 19-21) cannot and should not alter the sentence imposed for his less "positive" actions for which he was convicted.[5]

In short, Thompson's lack of prior criminal convictions is not a persuasive basis upon which to reduce his sentence for his subsequent conviction for this particularly heinous crime—the deliberate and savage multiple stabbing of a twenty-year-old woman in connection with a rape.

C. Thompson's Claim That The Prosecutor Pursued Inconsistent Theories At His And Leitch's Trials

As a further ground for clemency, Mr. Thompson argues that the prosecutor pursued incompatible theories at his trial and that of his co-defendant, Mr. Leitch. He claims that at Leitch's trial, the prosecution argued that "Leitch had the sole motive and the opportunity to commit the murder, and that he was equally or more culpable than Mr. Thompson." (Petition at 36.) However, the fact that Leitch had the motive to murder Ms. Fleischli—apparently because he felt she was undermining his opportunity to reconcile with his ex-wife—does not exonerate Thompson. As the trial judge observed in a 1994 letter for Leitch's parole hearing, Leitch may have had the motive, but "[i]n Thompson, who portrayed himself as a Vietnam veteran, a mercenary and a killer, Leitch had finally found the person to do this dirty work."

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5. In passing, I note that the claim inThompson's petition that he intervened "to prevent the murder of a prison guard" (Petition at 20) has been thoroughly refuted. (*See* Declaration of Scott Powell.)

Furthermore, the claim of inconsistent theories was litigated in Mr. Thompson's federal habeas petition, and both the district court and a unanimous three-judge panel of the Ninth Circuit found it to be without merit. *See Thompson* v. *Calderon*, 109 F.3d at 1371-2. In any event, the prosecution's theory in Leitch's trial in no way exonerated Thompson.

D. Disparity In Sentences Imposed On Thompson And Leitch

Although Thompson was sentenced to death, his co-defendant, David Leitch, received a sentence of 15 years to life. As a final ground for clemency, Mr. Thompson's clemency petition argues that it would be inequitable to execute him in light of the disparity in sentences "for co-defendants found guilty for [the] same crime." (Petition at 38.)

However, both defendants were not convicted of the same crimes. The disparate sentences are attributable to the fact that Leitch was acquitted of rape and was convicted only of second-degree murder.

Moreover, the fact that Leitch may have received a more lenient sentence than he deserved does not undermine the legitimacy of Thompson's sentence. If any injustice exists, it is that Mr. Leitch got less than he deserved.

V. Decision

Thomas Thompson has had his day in court. He squandered it by feeding the jury lies and contradictions when he testified. Even today, while proclaiming his innocence, he offers no plausible explanation of the evidence against him. Instead, his claim of innocence is premised on the inherently incredible alibi that he slept through a struggle, a murder, an elaborate wrapping of the victim's head and body, and an extensive carpet scrubbing to remove her blood. I will not set aside the collective judgment of twelve jurors on the basis of a clemency petition premised on such an inherently incredible alibi.

Thompson's "newly" discovered evidence—the cornerstone of his claim of innocence— comes down to a single inconclusive statement of dubious accuracy and credibility by his co-defendant, which the U.S. District Court recently ruled was "contradicted both by some of [his co-defendant's] other statements, as well as the compelling physical evidence of rape."

I asked for the views of Judge Robert Fitzgerald, who presided over the trials and sentencing of both Thompson and Leitch. His July 11,1997 response states:

> Let me be explicitly clear about this matter: It would be an absolute tragedy and a travesty of justice to even seriously consider clemency in this case... . There is absolutely no basis for the granting of clemency to this man for such an outrageous, cowardly, and brutal crime against another defenseless human being... . I can assure you that this case and this defendant belong to that special category for which the death penalty was intended. The sentence selected by the jury and which I imposed over thirteen years ago should be carried out.

I agree. Despite the diligent and very skillful efforts of his attorneys, Thompson's arguments for clemency and his claims of innocence are built on sand—the sand of an inherently incredible alibi, which itself is inconsistent with the facts and which followed previous alibis, which Thompson now admits were merely lies.

No one can foreclose the possibility that one day an innocent man on death row will seek clemency, showing, with rectitude in accordance with a reasonable explanation from which he has never wavered, that a terrible mistake has been made. But Thomas Thompson is not that man, and he has not remotely approached making any such showing.

Ginger Fleischli's death sentence arrived within hours of her encounter with Mr. Thompson on September 11, 1981. By contrast, Mr. Thompson has had more than 16 years of life since

he committed the ultimate crime. I will not stand in the way of his ultimate punishment.

Clemency is denied.

Dated: July 31, 1997

Governor Pete Wilson